NO. 83-5939

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

HORACE FRANKLIN DUNKINS, JR.,

Petitioner

v.

STATE OF ALABAMA,
Respondent

ON PETITION FOR WRIT OF CERTIORARI

TO THE ALABAMA SUPREME COURT

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant certiorari where the initiation by the Petitioner of discussions regarding the matter under investigation satisfies both the plurality and dissenting opinions in Oregon v. Bradshaw?

2. Does the fact-dominated question of whether the Petitioner initiated discussions after invoking his right to counsel and later explicitly waived this right present any questions worthy of review by certiorari?

3. Does the fact-dominated Witherspoon issue present any question worthy of review by certiorari?

4. Should this Court consider issues not presented to courts below and not decided by them?

PARTIES

The caption contains the names of all parties in the courts below.

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TABLE OF AUTHORITIES

OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming the Petitioner's conviction and death sentence, Dunkins v. State, 437 So.2d 1349 (Ala. Crim. App. 1983).

2. The opinion of the Alabama Supreme Court affirming the Court of Criminal Appeals decision is Ex parte Dunkins, 437 So.2d 1356 (Ala. 1983).

JURISDICTION

The decision of the Alabama Supreme Court from which the Petitioner seeks relief was entered on September 16, 1983. Rehearing was not sought. The Petitioner's scheduled execution was stayed by Justice Powell in an order dated November 14, 1983.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petition raises issues involving the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

The statute under which the Petitioner was indicted and convicted, Code of Alabama (1975), § 13A-5-31(a)(3) provides as follows:

> If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses: ...

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 year of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant.

STATEMENT OF THE CASE

The facts of the crime, as found by the trial court in its sentencing order, are as follows:

> That the victim, Lynn Kistler McCurry, was a twenty-six year old white woman, the mother of four chiildren. That during the late night hours of May 26, 1980 or the early morning hours of May 27, 1980, the defendant in company with one, Frank Marie Harris, forced their way into the home of the said Lynn Kistler McCurry. The Court further finds that the said victim, Lynn Kistler McCurry, was raped in her home while her four minor children were sleeping. The Court finds the following fact, that the defendant and Frank Marie Harris did forcibly carry the victim, Lynn Kistler McCurry, some two hundred yards from her home, tie her to a tree with some white tape; that the victim again was raped. The Court makes the further finding of fact that the said victim was stabbed by the defendant and the said Frank Marie Harris sixty-six times, causing her death. The Court makes the finding of fact that the stab wounds ranged from the chest area to the abdomen to the legs, the vaginal fault and buttocks; that during the stabbing a pot holder glove was forced into the mouth of the victim, Lynn Kistler McCurry, to prevent her from screaming or uttering sounds. According to the testimony of the medical examiner-assistant pathologist, Mr. Jay Glass , that each stab wound showed vital signs and the Court finds that the victim was in fact alive during each of the stab wounds being inflicted upon her

> body. The Court further finds that as a result of said stabbing, the victim was intentionally killed by the defendant. The Court makes the further finding of fact that from the confession-statement of the defendant, Horace Franklin Dunkins, Jr., that he admitted his complicity in the said crime.
> (R. 1120)

On October 10, 1980, the Petitioner was indicted by the Grand Jury of Jefferson County, Alabama, for the Code of Alabama (1975), §13A-5-31(a)(3) capital offense of "[r]ape when the victim is intentionally killed by the defendant" (R. 1102 &1103). On October 16, 1980, the Petitioner was arraigned and pleaded not guilty (R. 1106). On April 16, 1981, the Petitioner filed a motion to suppress his statement (R. 1110); after hearing the motion to suppress was denied (R. 1111). On May 18, 1981, the trial of the Petitioner commenced; after hearing the evidence the jury found the Petitioner guilty of the capital offense as charged in the indictment (R. 1112). Thereafter, in accordance with the mandate of the Alabama Supreme Court in Beck v. State, 396 So.2d 645 (Ala. 1981), a sentencing hearing was conducted before the jury on May 22, 1981 (R. 1119). After presentation of evidence and arguments regarding aggravating and mitigating circumstances, the jury returned a verdict fixing punishment at death (R. 1119). On May 29, 1981, the trial court held a separate sentencing hearing (R. 1112). The trial court then, as mandated in Beck v. State, supra, weighed the aggravating and mitigating circumstances found to exist, and, finding the aggravating circumstances to outweigh the mitigating circumstances, sentenced the Petitioner to death (R. 1122). On June 26, 1981, the Petitioner filed a motion for new trial (R. 1124), which was denied on August 28,

1981 (R. 1126).

On February 1, 1983, the Alabama Court of Criminal Appeals issued an opinion affirming the Petitioner's conviction and sentence. Dunkins v. State, 437 So.2d 1349 (Ala. Crim. App. 1983). On March 1, 1983, that court overruled the Petitioner's application for rehearing.

Certiorari was granted by the Alabama Supreme Court as a matter of right pursuant to Alabama Rule of Appellate Procedure 39(c), and on September 16, 1983, that Court issued an opinion affirming the decision of the Alabama Court of Criminal Appeals in this case. Ex parte Dunkins, 437 So.2d 1356 (Ala. 1983). Rehearing was not sought.

On October 13, 1983, the Alabama Supreme Court set November 18, 1983, as the Petitioner's execution date. On November 11, 1983, the Petitioner requested this Court to stay execution pending disposition of a petition for writ of certiorari, and on November 14, 1983, Justice Powell of this Court issued an order staying the Petitioner's execution pending the disposition of this petition.

SUMMARY OF ARGUMENT

The initiation of discussion by the Petitioner after he invoked his right to counsel satisfies both the plurality and the dissenting opinion in Oregon v. Bradshaw, 459 U.S. ___, 103 S.Ct. 2830, 77 LEd. 2d 405 (1983). Thus this case is not the vehicle to settle any dispute between the two wings of this Court.

Any question as to whether the Petitioner initiated further discussions after invoking his right

to counsel and later explicitly waived his right to counsel invokes factual disputes not worthy of this Court's consideration.

The Witherspoon issue at most presents a factual dispute not worthy of this Court's consideration.

The lesser included offense issue was neither raised nor decided in the courts below.

ARGUMENT

I. THE INITIATION BY THE PETITIONER OF DISCUSSION REGARDING THE MATTER UNDER INVESTIGATION SATISFIES BOTH THE PLURALITY AND DISSENTING OPINIONS IN OREGON V. BRADSHAW.

Under Argument One of his brief in support of the granting of certiorari the Petitioner attempts to entice the Court by claiming his case as a vehicle by which the Court may settle a standing dispute. This case cannot be so characterized.

In Edwards v. Arizona, 451 U.S. 477 (1981), the Court held that once a suspect invokes his right to counsel, he may not be interrogated further, absent counsel, unless the suspect himself initiates further communications, exchanges, or conversations. 451 U.S. at 484 & 485. During last term, in Oregon v. Bradshaw, 459 U.S. ___, 103 S. Ct. 2830 77 LEd. 2d 405 (1983), the Court held, in a plurality opinion by Justice Rehnquist, that this initiation by the suspect need only "evince a willingness and desire for a generalized discussion about the investigation", 459 U.S. at ___, 77 LEd. 2d at 412. According to the dissenting opinion of Justice Marshall, in which three other justices joined, the initiation must indictate that the suspect "had in mind communication or dialogue about

the subject matter of the criminal investigation" (emphasis in original). 459 U.S. at ___, 77 LEd. 2d at 418. Thus any disagreement among eight members of the Court is as to the nature of the suspect's initiation, and not as to whether an initiation by the suspect is absolutely required.

The facts in this case, as found by the Alabama appellate courts, satisfy the requirements of both wings of the Court on this question. After the Petitioner was read his Miranda rights and had invoked his right to counsel, all questions about the murder ceased, Dunkins v. State, 437 So. 2d 1349, 1351 (Ala. Crim. App. 1983). Although the Petitioner was asked several more questions, these concerned his age, height, weight, name, address and telephone number, and did not concern the matter under investigation, 437 So.2d at 1351. While being driven back to work, the Petitioner volunteered to the officer driving him to take a polygraph test. Ex parte Dunkins, 437 So.2d 1356, 1358 (Ala. 1983) After the test, the Petitioner told Deputy House that he would be willing to talk to House more if needed, and informed House of when he would be available for questioning; 437 So.2d at 1352. It was only subsequent to this, during a conversation with officers pursuant to the Petitioner's second statement regarding his willingness to talk, that the Petitioner admitted his involvement in the crime. Thus the initiation of conversation by the Petitioner was specifically addressed to the subject of the criminal

investigation, and would satisfy both the plurality and dissenting opinions in Oregon v. Bradshaw, supra.

II. ANY QUESTION AS TO WHETHER THE PETITIONER INITIATED DISCUSSIONS AFTER INVOKING HIS RIGHT TO COUNSEL AND LATER EXPLICITLY WAIVED HIS RIGHT TO COUNSEL TURN UPON FACTUAL DISPUTES NOT WORTHY OF THIS COURT'S CONSIDERATION.

Under Argument Two of his brief the Petitioner claims that, even if this case is not utilized to resolve the alleged dispute evidenced by Bradshaw, certiorari should be granted because the admission of the Petitioner's confession violates both Edwards and Bradshaw. The factual premise upon which he bases his argument, however, is at odds with the facts as found by the Alabama appellate courts. At the risk of needless repetition, it must be pointed out that the Alabama courts found: (1) that when the Petitioner invoked his right to counsel, all questions regarding the murder ceased, 437 So.2d 1349, 1351; 437 So.2d 1356, 1357; (2) that after the Petitioner had been released from custody and was being taken back to his job he volunteered to take a polygraph test; 437 So.2d 1356, 1358; (3) that after the polygraph test the Petitiioner told an officer that he would be available to talk to the officer if the officer so desired, 437 So.2d 1349, 1352; and (4) that the confession in which the Petitioner admitted his involvement in the crime was made only after an officer, relying upon the Petitioner's assurance of cooperation, called the Petitioner and the Petitioner agreed to speak to the police again, 437 So.2d 1349, 1352. The confession was obtained only after another Miranda warning and both an oral and a written waiver of rights. 437 So.2d 1349,

1352. While the Petitioner claims that he was questioned on the way to and from the polygraph test, the record does not support this (R. 136). Contrary to the Petitioner's assertion, he was not rearrested just prior to the confession. 437 So.2d 1349, 1352. While the Petitioner makes other claims regarding a statement to the Petitioner by the police chief and the confrontation of the Petitioner with the co-defendant's statement, these are irrelevant to the Edwards issue because they occurred after the Petitioner had explicitly waived his right to counsel.

The Alabama courts did not lightly pass over the Petitioner's claims of violation of his rights under Edwards. Those courts, correctly applying Edwards, made factual findings that the Petitioner had initiated further conversations regarding the matter under investigation after invoking his right to counsel, 437 So.2d 1356, 1358, and that subsequently he explicitly waived his right to counsel before confessing, 437 So.2d 1349, 1352; 437 So.2d 1356, 1358.

The Petitioner in his brief makes certain factual claims which differ from the conclusions of the Alabama courts. This Court generally does not sit to review state court factfindings, see, e.g., California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 111-112 (1980); N.L.R.B. v. Waterman S.S. Corp., 309 U.S. 206, 208 (1940). Based upon the controlling factfindings of the Alabama appellate courts, those courts correctly found under Edwards and Bradshaw that the Petitioner waived his right to counsel before confession. Unless this Court wishes to waste its limited certiorari assets and become just another step on the direct appeal ladder, it should deny certiorari as to this issue.

III. THE WITHERSPOON ISSUE IS FACTUALLY DOMINATED AND IS THUS NOT WORTHY OF REVIEW BY CERTIORARI. ANY LEGAL ISSUE ARISING FROM THE EXAMINATION OF THE VENIREMAN IS INSIGNIFICANT.

The Petitioner asserts that "[t]he Alabama Courts in this case, however, apparently misunderstood the plain teaching of Witherspoon" (Petitioner's brief, p. 13). This assertion is totally without merit. The Alabama Court of Criminal Appeals held:

> Here, Ms. Mencer indicated that she was unwilling to consider all of the penalties provided by state law, and that she was irrevocably committed before the trial began, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings and even if convinced of the defendant's guilt of the crime charged beyond any reasonable doubt and to a moral certainty.
> 437 So.2d at 1355 & 1356

This is exactly what Witherspoon v. Illinois, 391 U.S. 510 (1968), requires. 391 U.S. at 522, n. 21. The Alabama Supreme Court approved of this holding by the Court of Criminal Appeals. Ex parte Dunkins, 437 So.2d 1356, 1357 (Ala. 1983).

The extensive voir dire examination of Ms. Mencer, the relevant part of which is set out below, fully supports the hearing of the Court of Criminal Appeals:

> MR. NAIL: You understand, ladies and gentlemen, that this case will be tried in two phases. The first phase of the trial is what is called the guilt phase. The first thing you must decide from the evidence is guilt or innocence of the charge. And his Honor will explain all of this a lot better than I can. If you were convinced beyond a reasonable doubt that the defendant was guilty of the capital murder, then you would go into a sentencing phase in which you would

consider the sentence. And one of the alternatives is death in the electric chair, or death in this case.

Now, Mrs. Jordan, what I'm asking you, and I know this puts you on the spot, but do you --

MR. STOVALL: Your Honor, I object to that.

THE COURT: Mr. Nail, let me interrupt you. Let's include everyone in this question. It's not limited just to Mrs. Jordan.

MR. NAIL: I didn't mean to limit it just to you, because there were a lot of others who responded. But to all of you who responded, do you know right now, regardless of what the evidence may be in this case that you know right now, based on your feeling about capital punishment that you could not return a verdict of guilt of capital murder in this case?

Mrs. Mencer: is that right

PJ MENCER: I know that I could not return any decision as to someone being murdered simply because I think that's the easiest way out. I feel like if a person has really committed a crime that badly, then to serve a lifetime in prison would be the worst punishment they could have, because they have to live with that.

MR. NAIL: Let me interrupt you right there and put it to you in this way. And here again, I'm talking to all of your who responded in this light.

You ladies and gentlemen don't know what the evidence will be in this case at this pont. And it's kind of putting you on the spot, but you've expressed that you have fixed or strong feelings: you do not believe -- Most of you with the exception

of a couple of you said I do not believe in capital punishment. Now, to me, I interpret that one way. But what I must ask you is this, ladies and gentlemen, and I know it's the same question I asked you earlier, but do you know right now without listening to any of the evidence in the case, or knowing anything else about the case other than what you have heard at this time that you could not return a verdict of capital murder regardless of what the evidence was, and that you could not sentence someone to death even if you felt like the State proved him guilty and met this burden, as his Honor will explain the law to you. You could not do that, Mrs. Mencer?

PJ MENCER: No, sir.

MR. NAIL: That's all I need to know, please ma'am.

(R. 271-273) (emphasis added)

Thereafter the trial court permitted individual voir dire of Ms. Mencer, as is set out below:

THE COURT: Mrs. Mencer, I don't want you to feel that we're picking on you, but in view of some of the answers that you gave to the District Attornye's questions, we have to bring you in here outside the hearing and presence of the other jurors. And I need to go into it a little more thoroughly with you, because it's incumbent upon the Court to see this young man and the State both receive a fair and impartial trial.

You stated that you were opposed to capital punishment.

PJ. MENCER: Yes, sir.

THE COURT: Is your feeling towards capital punishment such that you know right now and you knew yesterday and you know any time in the future

that regardless of whatever the evidence would be, that should you be convinced beyond a reasonable doubt and to a moral certainty of the guilt of this defendant or any defendant, and should the punishment be fixed at death, that you could not fix punishment at death?

PJ MENCER: Yes, I do.

THE COURT: You know that right now?

PJ MENCER: Yes, sir.

THE COURT: Can you conceive in your own mind of any circumstance in a criminal case where you would be called upon to be a juror that should you be convinced beyond a reasonable doubt and to a moral certainty of the guilt of any defendant, that you could not then fix punishment at death, if that were to be one of the punishments

PJ MENCER: I could not do it.

THE COURT: Any questions, gentlemen?

MR. NAIL: No, sir.

MR. STOVALL: Yes, sir.

Mrs. Mencer, I noticed that you said out in the courtroom that you wouldn't give the death penalty because you felt like that was the easy way out.

PJ MENCER: I do feel that way.

MR. STOVALL: And that life in prison would be worse than the death penalty?

PJ MENCER: I do feel that way.

MR. STOVALL: Well, if you had the options of sentencing someone to death or sentencing that person to life in prison without parole, could you weigh the factors involved and consider both sentences

PJ MENCER: I would absolutely say life in prison without parole.

If I absolutely, unequivocally, knew or felt with all the evidence that had been presented that this person had commited a crime and was really guilty of it, I would say give him life imprisonment without parole, because I feel to die would be the easy way out.

MR. STOVALL: Well, what if you had someone who -- What you're saying is that life in prison without parole is worse in your mind than the death penalty?

PJ MENCER: Yes, I feel that way.

MR. STOVALL: Are you telling me then that you have some convictions against the death penalty other than that?

PJ MENCER: Well, maybe I'm not stating my position as clearly as -- Maybe I don't know how to do it. But I know that this is the way I feel. I feel that anybody who commits a crime should be punished even if it's my son, and I only have the one. However, I do not feel that death is the answer. I feel that if I take a life, an eye for an eye is not the answer. I feel that I need to know the feeling. I need to feel it. And the only way I can feel it is to live, eventually live, with my conscience, live with the thought that I have committed this act or this crime. So that I feel to suffer behind bars is a much greater punishment than death. I look at death as being the same as being asleep. And when I'm asleep, I don't know anything about what I've done. I mean I'm at peace--let me say it that way--I'm at peace. But if I have to face day in and day out behind bars and I know that I'm not going to be paroled, or the other person, I feel that's worse than dying.

MR. STOVALL: Let me ask you this: Is that the only reason that you're opposed to the death penalty is that you feel that people, if they're guilty, that they ought to spend the rest of their life behind bars

PJ MENCER: That's the only reason.

MR. STOVALL: You don't have any -- Well, I withdraw that.

I don't have any other questions.

THE COURT: Any questions?

MR. NAIL: But using Mr. Stovall's example he gave you about considering other things and that you would sentence to life without parole, are you telling us that you could do that, but under no circumstances could you sentence the individual to die?

PJ MENCER: Under no circumstances would I want them to get out that lightly. And that's what I'm saying. I feel that if they have committed a crime, then they should not die, because that is too easy.

MR. NAIL: What I'm asking you--not your personal opinion about it--I'm asking you using Mr. Stovall:s example about considering other sentences and you said you could sentence to life without parole-- are you telling us under no circumstances, regardless of the evidence, that you could sentence an individal to die--that you could sentence to life without parole, but you could not setence someone to die regardless of the evidence?

PJ MENCER: I don't believe in it. I do not believe that he should die--that anyone should die. I believe that's the reason.

MR. NAIL: That's all.

(R. 403-408) (emphasis added)

It is clear from the above portions of the voir dire of Ms. Mencer that there was ample evidence to support the factual finding of the Alabama courts as to Ms. Mencer's unwillingness to impose the death penalty.

At page eight of his brief the Petitioner sets out a small portion of the voir dire examination of Ms. Mencer, and insists that this portion proves that her opposition to the death penalty was simply an opinion and that under certain circumstances she could vote for the death penalty. The quoted examination can best be understood when set out in context:

MR. NAIL: You just told me a few minutes ago in questions earlier that you couldn't sentence anyone to die for the commission of a criminal offense, and yet you just answered Mr. Stovall's question if you were convinced someone had committed a criminal offense--and it's really an unfair question for for you--of a horrible offense, he said--

PJ MENCER: Yes.

MR. NAIL: --and you were given the choice of either turning them loose completely back out on society or sentence them to die, then you could under those circumstances?

PJ MENCER: I could. I would not want to see them out.

MR. NAIL: Okay. Let me just pick it up from there. Let's assume that you're not faced with that situation, that the situation you're faced with is this: You're convinced from the evidence that the person, the defendant, is guilty. Then it comes time to sentence that individual. You listen to testimony and you listen to evidence concerning what sentence

the defendant should receive, and you were convinced that the crime was terrible, that it was a heinous, atrocious crime, and there was no justification or mitigation for the crime, and you had the choice of sentencing him to die or life without parole, could you sentence that individual to die?

PJ MENCER: I'm getting kind of confused.

MR. NAIL: I know that's kind of -- It's a long question and it's unfair.

I guess it gets back down to this, Mrs. Mencer. And I'll restate it just as you answered it earlier, same question. Outside of the limited circumstances Mr. Stovall gave you, whether you've either got to turn a heinous criminal loose or sentence him to die, is there any other circumstance where you could sentence someone to die for the commission of a criminal offense.

PJ MENCER: If given an alternative -- I'd say it like this: If given an alternative as to whether or not he could serve-anyone could serve life imprisoment without parole, even I think I would not agree for them to be--I would not want to see them paroled if they had committed an atrocious crime, then I might even say, well, then, you know, they might need to die. But if I had an alternative, my thing would be to let him live it in prison behind bars for the rest of his life, so that he can suffer the way the other person's loved ones might be suffering. To die is too easy.

MR. NAIL: So, if I understand you correctly, then the key is the alternative?

PJ MENCER: Right.

MR. NAIL: If there is an alternative

to death, you would always vote for imprisonment over--

PJ MENCER: Life imprisonment.

MR. NAIL: Life imprisonment without parole?

PJ MENCER: That's right: life imprisonment.

MR. NAIL: That's all.

THE COURT: Any further questions?

MR. STOVALL: No, sir.

(R. 409-411)

The above quoted portion shows that Ms. Mencer only indicated a willingness to impose death if she were faced either with a choice of sentencing an obviously guilty man to death or setting him free, or with a choice of sentencing such a person to death or life with a possibility of parole. These are not the choices open to a juror under Alabama law. The Petitioner was tried under the mandate of Beck v. State, 396 So.2d 645 (Ala. 1981), which held that after finding a defendant guilty of capital murder the jury, after weighing aggravating and mitigating circumstances, must sentence him either to death or to life without parole. 396 So.2d at 645. Ms. Mencer made it clear that when those were the choices she would not vote for death. Witherspoon held that:

> The most that can be demanded of a venireman in this regard is that he is willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the death penalty regardless of the facts and circumstances that might emerge in the course of the proceedings.
>
> 391 U.S. at 522, n.21 (second and third emphasis added)

Thus before exclusion it must be found that the

prospective juror would vote against death regardless of the evidence presented, and not that he or she would vote against death under some choice of penalties other than those provided under state law. It is not relevant to a Witherspoon inquiry that the prospective juror could vote for death under a strictly hypothetical legal situation. Thus any legal question arising out of the examination is insignificant.

At most the voir dire testimony of Ms. Mencer presents a factual question as to whether Ms. Mencer would ever vote for death regardless of the evidence presented. This Court generally does not sit to review state court factfindings. See, e.g., California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 111-112 (1980); N.L.R.B. v. Waterman, S.S. Corp., 309 U.S. 206, 208 (1940). Unless this Court wishes to squander its limited certiorari assets and become just another step on the direct appeal ladder, it should deny certiorari as to this issue.

IV. THE LESSER INCLUDED OFFENSE ISSUE WAS NEITHER RAISED NOR DECIDED BY THE COURTS BELOW.

The issue of whether the trial court correctly instructed the jury regarding lesser included offenses was not raised nor decided in the appellate courts below. Dunkins v. State, supra; Ex parte Dunkins, supra. (see the Petitioner's briefs to said courts, attached hereto as Exhibits A and B). Because the Petitioner did not present this issue to the state appellate courts below and it was not decided by them, this Court need not decide it, Moore v. Illinois, 408 U.S. 786, 799 (1972); should not decide it, Fuller v. Oregon, 417 U.S. 40, 50 n. 11 (1974); and has no

jurisdiction to decide it, Street v. New York, 394 U.S. 576, 581-582 (1969); Barley v. Anderson, 326 U.S. 203, 206-207 (1945); see, 28 U.S.C. § 1257(2) and (3).

The Petitioner attempts to inject this issue by insisting that the issue was considered below because the Alabama Court of Criminal Appeals in its opinion cited Beck v. State, 397 So.2d 645 (Ala. 1981), in which the Alabama Supreme Court reinterpreted Alabama Capital Punishment statute which had been ruled unconstitutional in Beck v. Alabama, 477 U.S. 625 (1980), for preclusion of consideration of lesser included offenses. It is clear from the Alabama Court of Criminal Appeals' opinion that it cited Beck v. State, supra, as authority regarding the required examination of the propriety of the death sentence imposed and not concerning any issue of lesser included offenses. 437 So.2d 1349, 1356. Thus the Alabama Court of Criminal Appeals did not consider the lesser included offense issue.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William D. Little, a member of the Bar of the Supreme Court of the United, do hereby certify that I did serve copies of this brief on the Petitioner by placing a copy in the United States Mail, postage prepaid, and properly addressed to his counsel as follows:

Honorable John C. Falkenberry
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I further certify that I have served all parties required to be served.

Done this 18th day of January, 1984.

William D. Little

WILLIAM D. LITTLE
ALABAMA ASSISTANT ATTORNEY GENERAL

THE ALABAMA COURT OF CRIMINAL APPEALS

6 Div. 669

HORACE FRANKLIN DUNKINS, JR.

VS.

STATE OF ALABAMA

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STATEMENT OF THE CASE

Appellant, Horace Franklin Dunkins, Jr., was arrested on May 28, 1980, for the rape and intentional killing of Lynn Kistler McCurry. On September 25, 1980, Appellant was brought before the Honorable Robert W. Gwin and a preliminary hearing was had. Finding probable cause to hold the Appellant, to await the action of the Grand Jury, Judge Gwin ordered that the Appellant be "bound over".

Your Appellant was indicted and arraigned at which time Murray P. Stovall, III, was appointed by the Honorable Joseph Jasper to represent the Appellant.

On April 28, 1981, the Appellant came before the Honorable Joseph Jasper to be heard on a Motion to Suppress a statement of the Appellant and other preliminary motions.

On May 18, 1981, your Appellant was called upon to stand trial before the Honorable Joseph Jasper. A jury was impaneled, evidence heard, and the jury returned a verdict of guilty saying: "We the jury find the Defendant guilty of the capital offense as charged in the indictment."

A sentencing hearing was then begun, and after testimony the jury returned with a recommendation that the Defendant's punishment be fixed at death.

On May 29, 1981, your Appellant was sentenced to death by the Honorable Joseph Jasper. Whereupon, Appellant prosecutes this appeal.

STATEMENT OF FACTS

The evidence presented at the trial shows and the record indicates that Lynn Kistler McCurry was found dead after being raped on May 27, 1980.(R - 14)

Two unidentified black males came to Lawrence Blair's house the night of the murder around 9:30 p.m. asking to look at a go-cart. (R - 25) That same night, two black males were seen running from the scene of the crime. (R -25)

Blood was found coming away from the site indicating that the assailant was possibly injured. (R - 26)

The investigating officer, James Earl Smith, after investigating the crime site, went to the Defendant's place of employment, Alabama Wire Company, (R - 15) to question the nineteen (19) year old Defendant and Ernest Jackson, a co-worker, who rode to work with the Defendant. (R - 17)

The two men were handcuffed (R - 31) and taken to the Jefferson County Jail to participate in a line up. (R - 32) At the jail the Defendant was allegedly read his Miranda Rights (R - 36) whereupon, the Defendant requested counsel saying, "Before I talk anymore now, I would like to talk to my lawyer or either my mamma or somebody, I'm run down at this place." (R - 41)

The investigating officer then continued to interrogate the Defendant as to his age, height and similar personal

information. (R - 42) After participation in a line-up in which no identification was made, the Defendant was returned to his job. (R - 41)

The next day, May 28, 1980, the Defendant was given a polygraph examination, that morning and later that day, the Defendant was picked up at his house and taken to Warrior City Hall for further interrogation. (R - 198) Here the Defendant was kept for 48 minutes with no record or tape of what occurred during that time. (R - 202) He was read his Miranda Rights again and subsequently signed a waiver of those rights. The Defendant then gave a statement incriminating himself as having been present and participated in the rape and murder of Lynn Kistler McCurry. (R - 202)

The following is a summary of the witnesses and their testimony:

Detective James Earl Smith of the Jefferson County Sheriff's Department was assigned to investigate the death of Lynn Kistler McCurry. The Defendant was brought to Jefferson County Jail by Detective Smith for a line up and interrogated. After being in the line up and being interrogated awhile the Defendant asked for counsel, Detective Smith continued to ask miscellaneous questions about the Defendant's personal history. (R - 14)

Sergeant Fred House of the Jefferson County Sheriff's Department took the Defendant to Warrior City Hall at 6:20

or 6:25. Sergeant House read the Defendant his Miranda Rights and at 6:40 p.m. on May 28, 1980, obtained a written waiver of those rights and taped a confession. (R - 107)

Deputy Carl Johnson with the Jefferson County Sheriff's Department met with Detective Smith, Sergeant House and Lieutenant Jacobs at the Warrior City Hall on May 28, 1980. Deputy Johnson stated, he remembered a cassette recorded at Dunkins interrogation. Deputy Johnson also stated, he remembered a statement made to the Defendant that Frank Marie Harris had implicated him. (R - 168)

Police Chief, Roger Dale Beam, of Warrior, Alabama, interviewed Frank Marie Harris, who allegedly implicated the Defendant in the crime. Chief Beam told the Defendant he was implicated and he would prove the Defendant was guilty if it was the last thing he did. (R - 180)

Alan McCurry, the husband of the victim, found the victim tied to a tree and contacted the police. (R - 449)

Paul V. Skaggs, Warrior Police Department Patrolman, found the victim's body tied to a tree and roped the area off with evidence tape. (R - 464)

Charles C. Robey of the Jefferson County Medical Examiner's Office, testified as to the physical evidence collected at the scene and other physical evidence collected at the time of the autopsy.

Jay M. Glass, Chief Medical Investigator for the Jefferson County Coroner's Office, described all portions of the body, stab wounds and fractured ribs. (R - 487)

Lawrence V. Blair, Jr., Lynn and Alan McCurry's neighbor, testified that two black men came to his house at 10:00 p.m. on May 26, 1980. (R - 538)

Earl Ronald Jones, Lynn and Alan McCurry's neighbor, saw some dogs chase two black males up the road, south, in the opposite direction from the McCurry's house. Mr. Jones identified the Defendant as one of those black males and the other as Frank Marie Harris. Also saw two white males walking up the road "kindly drunk". Could not tell what clothes the black males were wearing. Some of Mr. Jones' testimony was in conflict with the statement given to James E. Smith. (R - 548)

Michael Beckham bought the adhesive tape, later introduced as used to tie the deceased hands. He testified he originally told the Police Frank Marie Harris sent him to buy the tape but at the trial said Horace Dunkins sent him for it. (R - 568)

James R. Bentley of Jefferson County Sheriffs' Department, takes the fingerprints at the Jefferson County Jail, and Bentley fingerprinted the Defendant. (R - 589)

George Knight, Evidence Technician for the Jefferson County Sheriff's Department, found a fingerprint on the

adhesive tape found on the victim. (R - 598)

James A. (Buddy) Howell, Deputy of Jefferson County Sheriff's Department, Evidence Technician, testified that the fingerprint found on the adhesive tape found on the victim was the Defendant's, Horace Dunkins, fingerprint. (R - 605)

Fred House, Detective Sergeant for Jefferson County, took Horace Dunkins' statement at approximately 6:40 p.m. on May 28, 1980. Deputy Carl Johnson was present. Deputy Howell read the trascribed statement of Horace Dunkins, taken on May 28, 1980. (R - 628)

George Knight, Evidence Technician, identified the location of rocks with blood stains, knife, socks, and Defendant's hair samples, etc. (R - 686)

C. C. Robey, of the Jefferson County Medical Examiner's Office, identified swabs, debris and hair from the victims body. (R - 708)

George Knight, Evidence Technician, identified exhibits of small rocks, adhesive tape and tape spool and pubic hair. (R - 724)

Kevin Noppinger, Forensic Serologist, (Body Fluids) for the State Department of Forensic Sciences, identified socks, bed spread, pot holder, knife, burnt clothing and shoes for exhibits. (R - 742)

James Earl Smith, gave the Defendant's blood, shorts,

shoes, saliva and penile samples to Noppinger. (R - 778)

Kevin Noppinger, testified the Defendant's shorts were stained with human blood and he did not find seminal fluids in the vagina of the victim. (R - 785)

James Earl Smith, Detective Sergeant of Jefferson County Sheriff's Department, was present when the blood samples were taken from the Defendant. Detective Smith also identified an aerial photograph of the scene of the incident. (R - 822)

Kevin Noppinger, testified that the blood found on the rocks at the scene is consistent with the Defendant's blood type. It was also introduced as evidence the percentage of the population with the same blood type. (R - 840)

James Earl Smith, identified the picture of the cut on the Defendant's hand. (R - 848)

Kevin Noppinger, testified that the test on the penile swabs were negative. (R - 852)

Charlie Richardson, Evidence Technician for Jefferson County Sheriff's Department, corroborated George Knight's testimony as to the location of rocks with blood stains. (R - 864)

Wayne Burrow, Trace Evidence Expert for Alabama Department of Forensic Science, identified the hair and debris samples found on the victim and on black socks and blanket in McCurry's house. (R - 873)

Lawden Yates, Firearm and Toolmark Examiner for the Alabama Department of Forensic Science, verified that the tape found

on the victim is the same tape as on the spool. (R - 897)

Myron Massey, Officer for the Warrior Police Department, got the blood samples from Frank Marie Harris. (R - 902)

Kevin Noppinger, testified as to the blood samples taken for Frank Marie Harris and their relation to the blood found on the rocks at the scene. (R - 908)

Edward Purifoy, neighbor of the Defendant testified as to the Defendant's good reputation. (R - 920)

John B. Wood, neighbor, character witness, testified as to the Defendant's good reputation, the witness testified on voire dire, outside the presence of the jury. However, as a result of having been in the Courtroom for sometime, the witness did not testify before the jury. (R - 926)

ARGUMENT

ISSUE I

The Court erred in denying the Appellant's Motion to Suppress statements made by the Appellant in violation of his right to remain silent and his right to counsel.

The Fifth Amendment states in pertinent part:

> "No person ... shall be compelled in any criminal case to be a witness against himself..."

The Fourteenth Amendment states in pertinent part:

> "...[N]or shall any state deprive any person of life, liberty, or property without due process of law ..."

Miranda v. Arizona, 384 US 436 (1966) [hereinafter cited as Miranda] broadened the right against self-incrimination to cover virtually all custodial police interrogations. The Court in Miranda summarized its decision in the following words:

> "We hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way, the privelege against self incrimination is jeopardized. Procedural safeguards must be employed to protect the privelege, and unless other fully effective means are adopted to notify that person of his right of silence and to assure that the exercise of that right will be scrupulously honored, the following measures are required. [The suspect] must be warned prior to any questioning, (1) That he has the right to remain silent, (2) That anything he says can be used against him in a Court of Law, (3) That he has the right to the presence of an attorney, and (4) That if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires."

In the case at bar, the Appellant clearly requested an

attorney. (R-41) Nevertheless, the authorities made no effort to find an attorney for the Appellant or to assist him in the effort by merely offering him the telephone. Instead, they continued to interrogate the Appellant asking him information about age, weight, height and the like. (R-42) This continued interrogation, the Appellant contends, rendered the Miranda warning a farce. This contention is supported by looking at the totality of the circumstances such as the characteristics of the Appellant, his age, his physical and mental condition, his education and his experience. These, along with the length and place of questioning make the right to counsel in this case effectively denied. This contention is also supported by the recent case of United States v. Hinckley, 525 F 2d 1342 (1981) which held that when the right to counsel is raised by the accused, it is the responsibility of the officer to see to it that he obtains an attorney and until such obligation is discharged, the interrogation must be suspended. The case at bar is similar or genuine effort to comply with the Appellant's request. The Appellant feels Edwards v. Arizona, 451 US 477, (1981) is the controlling authority for the case at bar concerning the issue of a waiver. In Edwards, after initial questioning, the Defendant made a request for counsel and the interrogation ceased. The next morning, police officers came to the jail and asked to see the Defendant who thereupon informed the detention officer that he did not want to speak to anyone.

The guard told him he had to talk and took him to the officers. They, again, informed him of his Miranda rights, and the Defendant thereupon implicated himself in the crime. The Trial Court ultimately denied Petitioner's Motion to Suppress his confession as did the Trial Court in the case at bar. (R-220) The Arizona Supreme Court upheld the holding that the waiver was voluntary. The Supreme Court rejected the "voluntary" standard of review and invoked the more stringent standard that the waiver of right to counsel must constitute a "knowing and intelligent relinquishment" or abandon of a known right or privelege, a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." Applying this standard to the case at bar, we see that the Appellant is a nineteen year old, rural, black male with little education. He is surrounded by police during interrogation. He hears accusations and promises to "get" him if its the last thing they do. (R-186)

The Appellant was also told that Frank Marie Harris had confessed to being on the scene and had told the police that Horace Franklin Dunkins was the one that had raped and killed the victim. (R-149) This tactic was obviously used, after a conscious decision by Sergeant House to scare the Defendant to talk. (R-151) A statement to a suspect that causes him

to have to rebut what a Co-Defendant has said is, and in this case, was an improper and undue influence. This is especially true in light of the design of the detectives, who knew that he had requested a lawyer.

The Supreme Court of Alabama in Womack v. State, 205 So. 2d 579 citing Redd v. State, 69 Ala. 255, 259, said,

> "The settled rule of this court is, that all extra-judicial confessions are prima facie involuntary, and they can be rendered admissible only by showing that they are voluntary and not constrained - or, in other words, free from the influence of fear or hope, applied to the prisoner's mind by a third person. The true test is whether, under all the surrounding circumstances, they have been induced by a threat or a promise, express or implied, operating to produce in the mind of the prisoner apprehension of harm or hope of favor. If so, whether true or false, such confession must be excluded from the consideration of the jury as having been procured by undue influence."

That there was in fact fear, and that that fear, intentionally placed in the mind of the Appellant, coerced the Appellant to talk is evidenced, without doubt, within his statement to the authorities.

"Once Frank Marie had tried to lie on me, and I couldn't go down and let them burn me for something that I didn't do. I had to tell the truth and let it back on Frank Marie and let him know that he did do this to this girl." (R-649) There can be no other reasonable interpretation of these words than to mean that the Appellant was in fact forced to talk out of "fear of burning" and the necessity to rebutt

the Co-Defendant's allegations.

Although the Miranda rights were read to the Appellant, and counsel was clearly requested, no attempt was made to obtain such counsel, and interrogation continued after a moment and the next day. The Miranda rights were, from an objective point of view, denied. The Supreme Court citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973), calls the right to counsel a prime example of those rights required the "special protection" of the knowing and intelligent waiver standard. The Court implied that we are dealing with a fundamental right. The Court's interest is not only focused on the individual's rights but just as sharply focused on protection from potential abuse of custodial interrogation procedures.

In Johnson v. Zerbst, 304 U.S. 458, the Court said that

> "... a waiver of the accused right to remain silent must be a relinquishment of a known Right" (emphasis added)

In this case the Miranda rights would have been mere words in the mind of the Defendant. When the Defendant requested a lawyer he was continued to be asked questions, he was continued to be held, he was not provided with, or given the opportunity to call counsel, he was placed in a line-up, and he was rearrested and subjected to a further 42 minutes of interrogation. Any waiver by this Appellant could not

have been a relinquishment of a known right.

The Supreme Court in Edwards also explains Michigan v. Mosley, 423 U.S. 96 (1975), the authority used by the Appellee. The procedural safeguards triggered by a request to remain silent and a request for counsel were distinguished. Only in the latter case was it required that interrogation cease until an attorney was present. In Fare v. Michael C., 442 U.S. 707 (1979), the Court referred to Miranda's "rigid rule" that an accused's request for Counsel is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease. Edwards reaffirmed the view of Rhode Island v. Innis, 446 U.S. 291 (1980) which referred to the "undisputed right" under Miranda to remain silent and to be free of interrogation "until he had consulted with a lawyer."

Edwards has also been followed by this Honorable Court in Warrick v. State, Ala. Cr. App. 409 So. 984 (1982), in which the suspect asked to talk to his family and lawyer, just as your Appellant did. (R-17 & 41) In another case decided by this Honorable Court, the interrogating officer even testified that the suspect was not in custody. Swint v. State, Ala. Cr. App. 409 So. 2d 992, 994. However, this Honorable Court found that the statements were obtained in violation of Edwards. In the instant case there is no question about custody. Sergeant House had told the Appellant that he was under arrest and what he knew about the case. (R-162)

The Appellant also submits that the Court erred in failing to suppress the statement because the State also failed to lay the proper predicate with respect to the voluntariness of the statement in that it failed to show that no promises or threats had been made by various deputies and police personnel who had custody of the Defendant after his inital arrest. (R-40 & R-46)

All Statements obtained from Appellant at custodial interrogations following his request for counsel are violative of Appellant's Fifth and Fourteenth Amendments right to have counsel present at custodial interrogation. The Appellant respectfully demands that this Court overrule the Trial Court and sustain the Motion to Suppress and remand the case for adjudication following such holding.

ARGUMENT

ISSUE II

The Appellant contends that the Court erred in admitting the Defendant's confession before the Corpus Delicti had been proved by the State. It is a well established rule in the common law and in Alabama that the Corpus Delicti must be established before evidence of any confession of the Defendant can be admitted into the case. Pierson v. State, 76 So. 487, 16 Ala. App. 197 (1917); Lewis v. State, 140 So. 179, 25 Ala. App. 32, (1932); Worrell v. State, 163 So. 901, 26 Ala. App. 577 (1935); Hine v. State, 72 So. 2d 296, 260 Ala. 668 (1954); Parker v. State, 112 So. 2d 493, 40 Ala. App. 244, Cert. Denied (1959); and Martin v. State, 210 So. 2d 704 (1968). The Appellant contends that Corpus Delicti was not proved by the State in its capital murder prosecution, in that the State failed to prove rape or attempted rape. To prove rape, one must show carnal knowledge of a woman by a man, accomplished forcibly and against her will. Myer v. State, 401 So. 2d 288 (1981), [hereinafter cited Myers]. Sexual intercourse is synonomous with carnal knowledge and proof of actual penetration is required. Myers at 291. In the case Sub Judice, no proof of penetration was presented. The Forensic Serologist, Kevin Noppinger, found no evidence of semen in the vagina of the victim. (R - 800) Hence there is no evidence of penetration, an essential element of rape, or even any evidence of

an attempted rape. Also, there were no epithelial cells found on the Defendant's penile swab (R - 853), indicating, again, the lack of evidence of this essential element. In Parker v. State, 112 So. 2d 493 (1959), [hereinafter cited Parker], the Court held in a prosecution for unlawful possession of prohibited liquor, that the Corpus Delicti was not established where the mailbox in which prohibited liquor was found was not situated on Defendant's premises. The corroborating evidence must prove the Corpus Delicti beyond a reasonable doubt before evidence of a confession can be admitted. The state did not meet that burden in Parker or in the case at bar.

A more recent case on point is Martin v. State, 210 So. 2d 704 (1968), [hereinafter cited Martin]. Martin was accused of breaking and entering with intent to ravish. Burglarly involves more than one element just as rape does. To prove burglarly it is essential to prove breaking into and entering of the house in question. Although the entering was proved in Martin, no one proved that the window was closed. If it was open and the Defendant entered through it, this is not a breaking. Similarly, an incident involving force against a woman with no proof of carnal knowledge (or sexual intercourse) is not rape. The Court in Martin held there was insufficient evidence to make out a case of burglarly. It said, "The State has the burden of proving the Corpus Delicti independently of the Defendant's confession before conviction can be upheld"

(citing Hill v. State, 92 So. 460; Singleton v. State, 35 So. 2d 375; Pate v. State, 63 So. 2d 223; Gamble v. State, 60 So. 2d 696).

In the case Sub Judice, the State has not met the burden of proving the Corpus Delicti in a capital murder charge. The Defendant's confession, therefore, was inappropriately admitted in the lower Court. The Appellant respectfully urges this Court to reverse the lower Court and to remand for reconsideration of this Issue.

ARGUMENT

ISSUE III

The Trial Court erred in allowing a challenge for cause, over the defense's objection, of a prospective juror, Laverne Mincor.

During the voir dire examination, the Trial Court granted a challenge for cause, over the defense's objection, for Ms. Mincor, stating:

> "As I understand her statement, that is, given an alternative, she would never vote for the death penalty regardless of the evidence." (R-412)

However, Ms. Mincor has in fact said that she could return a sentence of death under some circumstances, (R-408) and that the thrust of her objection to sentencing someone to death was that she felt that was the easy way out and that life in prison without parole would be a worse sentence. (R-405 and R-407). The very roots of the American system of jurisprudence are based upon the right of the Defendant to have a trial by jury comprised of a cross-section of the people of his community. In Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct.1770 (1968), the Court said the jury is given broad discretion to decide whether or not death is "the proper penalty" in a given case, and a juror's general

views about capital punishment play an inevitable role in any such decision. The Court in Witherspoon goes on to say a man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror, but a jury from which all such men have been excluded cannot perform the task demanded of it. In the instant case, prospective juror, Mincor, stated that she felt that life in prison without parole was a worse punishment than death because she looked at death as being the same as being asleep. She goes on to say "but if I have to face day in and day out behind bars and I know that I am not going to be paroled, or the other person, I feel that is worse than dying." Your Appellant contends that is a personal belief of the relative severities of the possible punishment and that belief, just as a belief that the death penalty was a more sever punishment, is a belief and a feeling held by members of his community and therefore, by members of a proper jury of his peers.

CONCLUSION

Appellant contends that the issues raised in this Brief indicate that the rights of the Appellant as guaranteed by the Constitution of the United States and the Constitution of the State of Alabama were violated in the investigation and prosecution of this case in the lower Court. Appellant submits that these issues require and justify an order of reversal by this Honorable Court, and that the sentence handed down by the lower Court demands that all issues raised by Appellant or those noted by this Court in a thorough search of the record, be viewed in a light most favorable to the Appellant.

For all of the above, Appellant respectfully requests that the judgment of the lower Court be reversed and this cause be remanded for further adjudication consistent with the findings and orders of this Honorable Court.

Respectfully submitted.

MURRAY P. STOVALL, III
ATTORNEY FOR APPELLANT.

SUMMARY OF RULINGS AND ACTIONS
ADVERSE TO APPELLANT

Record Page No.	Summary
165	The Court overruled the defense objection to State leading Sergeant House on direct examination.
220	The Court overruled the defense motic to suppress the statements to the authorities in violation of his Constitutional rights to remain silent.
378	The Court overruled the defense objection to a challenge for cause and allowed a challenge for cause for prospective juror, Burrell.
395	The Court overruled the defense objection for a challenge for cause concerning prospective juror, Ms. Kitler.
408	The Court overruled the defense objection to a challenge for cause of prospective juror, Lavender.
412	The Court overruled the defense objection to a challenge for cause for a prospective juror, Mincer.
425	The Court overruled the defense objection to excusing prospective juror Golson.
436	The Court overruled the defense objection to the systematic exclusion of blacks from the jury by the State and overruled a defense request for a mistrial.
472	The Court overruled the defense objection to introduction of State's Exhibit No. 2, State's Exhibit No. 3, State's Exhibit No. 4, State's Exhibit No. 5.

SUMMARY OF RULINGS AND ACTIONS
ADVERSE TO APPELLANT

Record Page No.	Summary
485	The Court overruled the defense objection to the introduction of State Exhibit No. 8.
496	The Court overruled the defense objection to introduction of State's Exhibit No. 12.
500	The Court overruled the defense objection to the introduction of State Exhibit No. 11.
509	The Court overruled the defense objection to the introduction of State Exhibit No. 9.
513	The Court overruled the defense objection to the introduction of State Exhibit No. 10.
576	The Court overruled the defense objection to the showing of a picture to Michael Beckham, the defense objection being that the picture was tantamount to a leading question.
592	The Court overruled the defense objection to the use and introduction of State's Exhibit No. 22 and 23.
603	The Court overruled the defense objection to a line of questioning concerning a fingerprint found on tape.
611	The Court overruled the defense objection to the identification of a photograph of a fingerprint on the grounds that the proper chain of custody had not been shown.

SUMMARY OF RULINGS AND ACTIONS ADVERSE TO APPELLANT

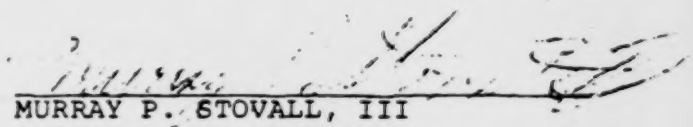
Record Page No.	Summary
613	The Court overruled the defense objection to testimony concerning a fingerprint found on the tape because of a lack of a proper chain of custody.
614	The Court overruled the defense objection to State's Exhibit No. 25 on the basis of the proper chain of custody not having been established.
627	The Court overruled the defense's renewal of a motion to suppress the statements made by the Defendant, said motion being based on Edwards v. Arizona.
635	The Court overruled the defense objection to the introduction of the statement of the Defendant.
688	The Court overruled the defense objection to the testimony concerning State's Exhibit No. 28 for identification.
690	The Court overruled the defense objection to the introduction of State's Exhibit No. 28.
692	The Court overruled the defense objection to the introduction of State's Exhibit No. 29.
693	The Court overruled the defense objection to the introduction of State's Exhibit No. 31.
694	The Court overruled the defense objection to the State's Exhibit No. 32.
701	The Court overruled the defense renewed objection to testimony concerning photograph of a spool of tape.

SUMMARY OF RULINGS AND ACTIONS ADVERSE TO APPELLANT

Record Page No.	Summary
790	The Court overruled the defense objection to the introduction of testimony about underpants and the underpants themselves of the Defendant as not having probity value and also that the pants had been substantially altered.
828	The Court overruled a renewed objection to the introduction of State's Exhibit No. 80, the underpants of the Defendant.
864	The Court overruled a defense renewed motion to suppress statements made by the Defendant based on Edwards v. Arizona.
920	The Court overruled the defense motion to suppress statements of the Defendant based on the failure of the State to show corpus delecti before the introduction of the statement. The Court also overruled the renewed defense motion to strike Michael Beckham's testimony based on a failure to make out a prima facie case under 13-A-5-31(3) of the Alabama Criminal Code. The Court also overruled a renewed motion by the defense to exclude and strike any evidence concerning the adhesive tape that had been admitted in the evidence, and any evidence arising out of the introduction of said adhesive tape, including but not limited to, the testimony and other evidence concerning fingerprints which were obtained from the tape.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the above and foregoing Brief of Appellant has been served upon the Honorable Charles Graddick, Attorney General for the State of Alabama, by mailing said copy to him, postage prepaid, by United States Mail, to his regular business address on this the 7th day of October, 1982.



MURRAY P. STOVALL, III
ATTORNEY FOR APPELLANT.

EXHIBIT B

IN THE SUPREME COURT OF THE STATE OF ALABAMA

BRIEF ADOPTED AS
SUBMITTED TO

THE ALABAMA COURT OF CRIMINAL APPEALS

S. CT. #_____

HORACE FRANKLIN DUNKINS, JR.

VS.

STATE OF ALABAMA

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TABLE OF CONTENTS

TABLE OF CASES

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(cont'd)

STATEMENT OF THE CASE

Appellant, Horace Franklin Dunkins, Jr., was arrested on May 28, 1980, for the rape and intentional killing of Lynn Kistler McCurry. On September 25, 1980, Appellant was brought before the Honorable Robert W. Gwin and a preliminary hearing was had. Finding probable cause to hold the Appellant, to await the action of the Grand Jury, Judge Gwin ordered that the Appellant be "bound over".

Your Appellant was indicted and arraigned at which time Murray P. Stovall, III, was appointed by the Honorable Joseph Jasper to represent the Appellant.

On April 28, 1981, the Appellant came before the Honorable Joseph Jasper to be heard on a Motion to Suppress a statement of the Appellant and other preliminary motions.

On May 18, 1981, your Appellant was called upon to stand trial before the Honorable Joseph Jasper. A jury was impaneled, evidence heard, and the jury returned a verdict of guilty saying: "We the jury find the Defendant guilty of the capital offense as charged in the indictment."

A sentencing hearing was then begun, and after testimony the jury returned with a recommendation that the Defendant's punishment be fixed at death.

On May 29, 1981, your Appellant was sentenced to death by the Honorable Joseph Jasper. Whereupon, Appellant prosecutes this appeal.

STATEMENT OF FACTS

The evidence presented at the trial shows and the record indicates that Lynn Kistler McCurry was found dead after being raped on May 27, 1980.(R - 14)

Two unidentified black males came to Lawrence Blair's house the night of the murder around 9:30 p.m. asking to look at a go-cart. (R - 25) That same night, two black males were seen running from the scene of the crime. (R -25)

Blood was found coming away from the site indicating that the assailant was possibly injured. (R - 26)

The investigating officer, James Earl Smith, after investigating the crime site, went to the Defendant's place of employment, Alabama Wire Company, (R - 15) to question the nineteen (19) year old Defendant and Ernest Jackson, a co-worker, who rode to work with the Defendant. (R - 17)

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Sergeant Fred House of the Jefferson County Sheriff's Department took the Defendant to Warrior City Hall at 6:20

or 6:25. Sergeant House read the Defendant his Miranda Rights and at 6:40 p.m. on May 28, 1980, obtained a written waiver of those rights and taped a confession. (R - 107)

Deputy Carl Johnson with the Jefferson County Sheriff's Department met with Detective Smith, Sergeant House and Lieutenant Jacobs at the Warrior City Hall on May 28, 1980. Deputy Johnson stated, he remembered a cassette recorded at Dunkins interrogation. Deputy Johnson also stated, he remembered a statement made to the Defendant that Frank Marie Harris had implicated him. (R - 168)

Police Chief, Roger Dale Beam, of Warrior, Alabama, interviewed Frank Marie Harris, who allegedly implicated the Defendant in the crime. Chief Beam told the Defendant he was implicated and he would prove the Defendant was guilty if it was the last thing he did. (R - 180)

Alan McCurry, the husband of the victim, found the victim tied to a tree and contacted the police. (R - 449)

Paul V. Skaggs, Warrior Police Department Patrolman, found the victim's body tied to a tree and roped the area off with evidence tape. (R - 464)

Charles C. Robey of the Jefferson County Medical Examiner's Office, testified as to the physical evidence collected at the scene and other physical evidence collected at the time of the autopsy.

Jay M. Glass, Chief Medical Investigator for the Jefferson County Coroner's Office, described all portions of the body, stab wounds and fractured ribs. (R - 487)

Lawrence V. Blair, Jr., Lynn and Alan McCurry's neighbor, testified that two black men came to his house at 10:00 p.m. on May 26, 1980. (R - 538)

Earl Ronald Jones, Lynn and Alan McCurry's neighbor, saw some dogs chase two black males up the road, south, in the opposite direction from the McCurry's house. Mr. Jones identified the Defendant as one of those black males and the other as Frank Marie Harris. Also saw two white males walking up the road "kindly drunk". Could not tell what clothes the black males were wearing. Some of Mr. Jones' testimony was in conflict with the statement given to James E. Smith. (R - 548)

Michael Beckham bought the adhesive tape, later introduced as used to tie the deceased hands. He testified he originally told the Police Frank Marie Harris sent him to buy the tape but at the trial said Horace Dunkins sent him for it. (R - 568)

James R. Bentley of Jefferson County Sheriffs' Department, takes the fingerprints at the Jefferson County Jail, and Bentley fingerprinted the Defendant. (R - 589)

George Knight, Evidence Technician for the Jefferson County Sheriff's Department, found a fingerprint on the

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adhesive tape found on the victim. (R - 598)

James A. (Buddy) Howell, Deputy of Jefferson County Sheriff's Department, Evidence Technician, testified that the fingerprint found on the adhesive tape found on the victim was the Defendant's, Horace Dunkins, fingerprint. (R - 605)

Fred House, Detective Sergeant for Jefferson County, took Horace Dunkins' statement at approximately 6:40 p.m. on May 28, 1980. Deputy Carl Johnson was present. Deputy Howell read the trascribed statement of Horace Dunkins, taken on May 28, 1980. (R - 628)

George Knight, Evidence Technician, identified the location of rocks with blood stains, knife, socks, and Defendant's hair samples, etc. (R - 686)

C. C. Robey, of the Jefferson County Medical Examiner's Office, identified swabs, debris and hair from the victims body. (R - 708)

George Knight, Evidence Technician, identified exhibits of small rocks, adhesive tape and tape spool and pubic hair. (R - 724)

Kevin Noppinger, Forensic Serologist, (Body Fluids) for the State Department of Forensic Sciences, identified socks, bed spread, pot holder, knife, burnt clothing and shoes for exhibits. (R - 742)

James Earl Smith, gave the Defendant's blood, shorts,

shoes, saliva and penile samples to Noppinger. (R - 778)

Kevin Noppinger, testified the Defendant's shorts were stained with human blood and he did not find seminal fluids in the vagina of the victim. (R - 785)

James Earl Smith, Detective Sergeant of Jefferson County Sheriff's Department, was present when the blood samples were taken from the Defendant. Detective Smith also identified an aerial photograph of the scene of the incident. (R - 822)

Kevin Noppinger, testified that the blood found on the rocks at the scene is consistent with the Defendant's blood type. It was also introduced as evidence the percentage of the population with the same blood type. (R - 840)

James Earl Smith, identified the picture of the cut on the Defendant's hand. (R - 848)

Kevin Noppinger, testified that the test on the penile swabs were negative. (R - 852)

Charlie Richardson, Evidence Technician for Jefferson County Sheriff's Department, corroborated George Knight's testimony as to the location of rocks with blood stains. (R - 864)

Wayne Burrow, Trace Evidence Expert for Alabama Department of Forensic Science, identified the hair and debris samples found on the victim and on black socks and blanket in McCurry's house. (R - 873)

Lawden Yates, Firearm and Toolmark Examiner for the Alabama Department of Forensic Science, verified that the tape found

on the victim is the same tape as on the spool. (R - 897)

Myron Massey, Officer for the Warrior Police Department, got the blood samples from Frank Marie Harris. (R - 902)

Kevin Noppinger, testified as to the blood samples taken for Frank Marie Harris and their relation to the blood found on the rocks at the scene. (R - 908)

Edward Purifoy, neighbor of the Defendant testified as to the Defendant's good reputation. (R - 920)

John B. Wood, neighbor, character witness, testified as to the Defendant's good reputation, the witness testified on voire dire, outside the presence of the jury. However, as a result of having been in the Courtroom for sometime, the witness did not testify before the jury. (R - 926)

ARGUMENT

ISSUE I

The Court erred in denying the Appellant's Motion to Suppress statements made by the Appellant in violation of his right to remain silent and his right to counsel.

The Fifth Amendment states in pertinent part:

> "No person ... shall be compelled in any criminal case to be a witness against himself..."

The Fourteenth Amendment states in pertinent part:

> "...[N]or shall any state deprive any person of life, liberty, or property without due process of law ..."

Miranda v. Arizona, 384 US 436 (1966) [hereinafter cited as Miranda] broadened the right against self-incrimination to cover virtually all custodial police interrogations. The Court in Miranda summarized its decision in the following words:

> "We hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way, the privelege against self incrimination is jeopardized. Procedural safeguards must be employed to protect the privelege, and unless other fully effective means are adopted to notify that person of his right of silence and to assure that the exercise of that right will be scrupulously honored, the following measures are required. [The suspect] must be warned prior to any questioning, (1) That he has the right to remain silent, (2) That anything he says can be used against him in a Court of Law, (3) That he has the right to the presence of an attorney, and (4) That if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires."

In the case at bar, the Appellant clearly requested an

attorney. (R-41) Nevertheless, the authorities made no effort to find an attorney for the Appellant or to assist him in the effort by merely offering him the telephone. Instead, they continued to interrogate the Appellant asking him information about age, weight, height and the like. (R-42) This continued interrogation, the Appellant contends, rendered the Miranda warning a farce. This contention is supported by looking at the totality of the circumstances such as the characteristics of the Appellant, his age, his physical and mental condition, his education and his experience. These, along with the length and place of questioning make the right to counsel in this case effectively denied. This contention is also supported by the recent case of United States v. Hinckley, 525 F 2d 1342 (1981) which held that when the right to counsel is raised by the accused, it is the responsibility of the officer to see to it that he obtains an attorney and until such obligation is discharged, the interrogation must be suspended. The case at bar is similar or genuine effort to comply with the Appellant's request. The Appellant feels Edwards v. Arizona, 451 US 477, (1981) is the controlling authority for the case at bar concerning the issue of a waiver. In Edwards, after initial questioning, the Defendant made a request for counsel and the interrogation ceased. The next morning, police officers came to the jail and asked to see the Defendant who thereupon informed the detention officer that he did not want to speak to anyone.

The guard told him he had to talk and took him to the officers. They, again, informed him of his Miranda rights, and the Defendant thereupon implicated himself in the crime. The Trial Court ultimately denied Petitioner's Motion to Suppress his confession as did the Trial Court in the case at bar. (R-220) The Arizona Supreme Court upheld the holding that the waiver was voluntary. The Supreme Court rejected the "voluntary" standard of review and invoked the more stringent standard that the waiver of right to counsel must constitute a "knowing and intelligent relinquishment" or abandon of a known right or privelege, a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused." Applying this standard to the case at bar, we see that the Appellant is a nineteen year old, rural, black male with little education. He is surrounded by police during interrogation. He hears accusations and promises to "get" him if its the last thing they do. (R-186)

The Appellant was also told that Frank Marie Harris had confessed to being on the scene and had told the police that Horace Franklin Dunkins was the one that had raped and killed the victim. (R-149) This tactic was obviously used, after a conscious decision by Sergeant House to scare the Defendant to talk. (R-151) A statement to a suspect that causes him

to have to rebut what a Co-Defendant has said is, and in this case, was an improper and undue influence. This is especially true in light of the design of the detectives, who knew that he had requested a lawyer.

The Supreme Court of Alabama in Womack v. State, 205 So. 2d 579 citing Redd v. State, 69 Ala. 255, 259, said,

> "The settled rule of this court is, that all extra-judicial confessions are prima facie involuntary, and they can be rendered admissible only by showing that they are voluntary and not constrained - or, in other words, free from the influence of fear or hope, applied to the prisoner's mind by a third person. The true test is whether, under all the surrounding circumstances, they have been induced by a threat or a promise, express or implied, operating to produce in the mind of the prisoner apprehension of harm or hope of favor. If so, whether true or false, such confession must be excluded from the consideration of the jury as having been procured by undue influence."

That there was in fact fear, and that that fear, intentionally placed in the mind of the Appellant, coerced the Appellant to talk is evidenced, without doubt, within his statement to the authorities.

"Once Frank Marie had tried to lie on me, and I couldn't go down and let them burn me for something that I didn't do. I had to tell the truth and let it back on Frank Marie and let him know that he did do this to this girl." (R-649) There can be no other reasonable interpretation of these words than to mean that the Appellant was in fact forced to talk out of "fear of burning" and the necessity to rebutt

the Co-Defendant's allegations.

Although the Miranda rights were read to the Appellant, and counsel was clearly requested, no attempt was made to obtain such counsel, and interrogation continued after a moment and the next day. The Miranda rights were, from an objective point of view, denied. The Supreme Court citing Schneckloth v. Bustamonte, 412 U.S. 218 (1973), calls the right to counsel a prime example of those rights required the "special protection" of the knowing and intelligent waiver standard. The Court implied that we are dealing with a fundamental right. The Court's interest is not only focused on the individual's rights but just as sharply focused on protection from potential abuse of custodial interrogation procedures.

In Johnson v. Zerbst, 304 U.S. 458, the Court said that

> "... a waiver of the accused right to remain silent must be a relinquishment of a known Right" (emphasis added)

In this case the Miranda rights would have been mere words in the mind of the Defendant. When the Defendant requested a lawyer he was continued to be asked questions, he was continued to be held, he was not provided with, or given the opportunity to call counsel, he was placed in a line-up, and he was rearrested and subjected to a further 42 minutes of interrogation. Any waiver by this Appellant could not

have been a relinquishment of a known right.

The Supreme Court in Edwards also explains Michigan v. Mosley, 423 U.S. 96 (1975), the authority used by the Appellee. The procedural safeguards triggered by a request to remain silent and a request for counsel were distinguished. Only in the latter case was it required that interrogation cease until an attorney was present. In Fare v. Michael C., 442 U.S. 707 (1979), the Court referred to Miranda's "rigid rule" that an accused's request for Counsel is per se an invocation of his Fifth Amendment rights, requiring that all interrogation cease. Edwards reaffirmed the view of Rhode Island v. Innis, 446 U.S. 291 (1980) which referred to the "undisputed right" under Miranda to remain silent and to be free of interrogation "until he had consulted with a lawyer."

Edwards has also been followed by this Honorable Court in Warrick v. State, Ala. Cr. App. 409 So. 984 (1982), in which the suspect asked to talk to his family and lawyer, just as your Appellant did. (R-17 & 41) In another case decided by this Honorable Court, the interrogating officer even testified that the suspect was not in custody. Swint v. State, Ala. Cr. App. 409 So. 2d 992, 994. However, this Honorable Court found that the statements were obtained in violation of Edwards. In the instant case there is no question about custody. Sergeant House had told the Appellant that he was under arrest and what he knew about the case. (R-162)

The Appellant also submits that the Court erred in failing to suppress the statement because the State also failed to lay the proper predicate with respect to the voluntariness of the statement in that it failed to show that no promises or threats had been made by various deputies and police personnel who had custody of the Defendant after his inital arrest. (R-40 & R-46)

All Statements obtained from Appellant at custodial interrogations following his request for counsel are violative of Appellant's Fifth and Fourteenth Amendments right to have counsel present at custodial interrogation. The Appellant respectfully demands that this Court overrule the Trial Court and sustain the Motion to Suppress and remand the case for adjudication following such holding.

ARGUMENT

ISSUE II

The Appellant contends that the Court erred in admitting the Defendant's confession before the Corpus Delicti had been proved by the State. It is a well established rule in the common law and in Alabama that the Corpus Delicti must be established before evidence of any confession of the Defendant can be admitted into the case. Pierson v. State, 76 So. 487, 16 Ala. App. 197 (1917); Lewis v. State, 140 So. 179, 25 Ala. App. 32, (1932); Worrell v. State, 163 So. 901, 26 Ala. App. 577 (1935); Hine v. State, 72 So. 2d 296, 260 Ala. 668 (1954); Parker v. State, 112 So. 2d 493, 40 Ala. App. 244, Cert. Denied (1959); and Martin v. State, 210 So. 2d 704 (1968). The Appellant contends that Corpus Delicti was not proved by the State in its capital murder prosecution, in that the State failed to prove rape or attempted rape. To prove rape, one must show carnal knowledge of a woman by a man, accomplished forcibly and against her will. Myer v. State, 401 So. 2d 288 (1981), [hereinafter cited Myers]. Sexual intercourse is synonomous with carnal knowledge and proof of actual penetration is required. Myers at 291. In the case Sub Judice, no proof of penetration was presented. The Forensic Serologist, Kevin Noppinger, found no evidence of semen in the vagina of the victim. (R - 800) Hence there is no evidence of penetration, an essential element of rape, or even any evidence of

an attempted rape. Also, there were no epithelial cells found on the Defendant's penile swab (R - 853), indicating, again, the lack of evidence of this essential element. In Parker v. State, 112 So. 2d 493 (1959), [hereinafter cited Parker], the Court held in a prosecution for unlawful possession of prohibited liquor, that the Corpus Delicti was not established where the mailbox in which prohibited liquor was found was not situated on Defendant's premises. The corroborating evidence must prove the Corpus Delicti beyond a reasonable doubt before evidence of a confession can be admitted. The state did not meet that burden in Parker or in the case at bar.

A more recent case on point is Martin v. State, 210 So. 2d 704 (1968), [hereinafter cited Martin]. Martin was accused of breaking and entering with intent to ravish. Burglarly involves more than one element just as rape does. To prove burglarly it is essential to prove breaking into and entering of the house in question. Although the entering was proved in Martin, no one proved that the window was closed. If it was open and the Defendant entered through it, this is not a breaking. Similarly, an incident involving force against a woman with no proof of carnal knowledge (or sexual intercourse) is not rape. The Court in Martin held there was insufficient evidence to make out a case of burglarly. It said, "The State has the burden of proving the Corpus Delicti independently of the Defendant's confession before conviction can be upheld"

(citing Hill v. State, 92 So. 460; Singleton v. State, 35 So. 2d 375; Pate v. State, 63 So. 2d 223; Gamble v. State, 60 So. 2d 696).

In the case Sub Judice, the State has not met the burden of proving the Corpus Delicti in a capital murder charge. The Defendant's confession, therefore, was inappropriately admitted in the lower Court. The Appellant respectfully urges this Court to reverse the lower Court and to remand for reconsideration of this Issue.

ARGUMENT

ISSUE III

The Trial Court erred in allowing a challenge for cause, over the defense's objection, of a prospective juror, Laverne Mincor.

During the voir dire examination, the Trial Court granted a challenge for cause, over the defense's objection, for Ms. Mincor, stating:

> "As I understand her statement, that is, given an alternative, she would never vote for the death penalty regardless of the evidence." (R-412)

However, Ms. Mincor has in fact said that she could return a sentence of death under some circumstances, (R-408) and that the thrust of her objection to sentencing someone to death was that she felt that was the easy way out and that life in prison without parole would be a worse sentence. (R-405 and R-407). The very roots of the American system of jurisprudence are based upon the right of the Defendant to have a trial by jury comprised of a cross-section of the people of his community. In Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct.1770 (1968), the Court said the jury is given broad discretion to decide whether or not death is "the proper penalty" in a given case, and a juror's general

views about capital punishment play an inevitable role in any such decision. The Court in Witherspoon goes on to say a man who opposes the death penalty, no less than one who favors it, can make the discretionary judgment entrusted to him by the State and can thus obey the oath he takes as a juror, but a jury from which all such men have been excluded cannot perform the task demanded of it. In the instant case, prospective juror, Mincor, stated that she felt that life in prison without parole was a worse punishment than death because she looked at death as being the same as being asleep. She goes on to say "but if I have to face day in and day out behind bars and I know that I am not going to be paroled, or the other person, I feel that is worse than dying." Your Appellant contends that is a personal belief of the relative severities of the possible punishment and that belief, just as a belief that the death penalty was a more sever punishment, is a belief and a feeling held by members of his community and therefore, by members of a proper jury of his peers.

CONCLUSION

Appellant contends that the issues raised in this Brief indicate that the rights of the Appellant as guaranteed by the Constitution of the United States and the Constitution of the State of Alabama were violated in the investigation and prosecution of this case in the lower Court. Appellant submits that these issues require and justify an order of reversal by this Honorable Court, and that the sentence handed down by the lower Court demands that all issues raised by Appellant or those noted by this Court in a thorough search of the record, be viewed in a light most favorable to the Appellant.

For all of the above, Appellant respectfully requests that the judgment of the lower Court be reversed and this cause be remanded for further adjudication consistent with the findings and orders of this Honorable Court.

Respectfully submitted.

MURRAY P. STOVALL, III
ATTORNEY FOR APPELLANT.

SUMMARY OF RULINGS AND ACTIONS ADVERSE TO APPELLANT

Record Page No.	Summary
165	The Court overruled the defense objection to State leading Sergeant House on direct examination.
220	The Court overruled the defense motion to suppress the statements to the authorities in violation of his Constitutional rights to remain silent.
378	The Court overruled the defense objection to a challenge for cause and allowed a challenge for cause for prospective juror, Burrell.
395	The Court overruled the defense objection for a challenge for cause concerning prospective juror, Ms. Kitler.
408	The Court overruled the defense objection to a challenge for cause of prospective juror, Lavender.
412	The Court overruled the defense objection to a challenge for cause for a prospective juror, Mincer.
425	The Court overruled the defense objection to excusing prospective juror, Golson.
436	The Court overruled the defense objection to the systematic exclusion of blacks from the jury by the State and overruled a defense request for a mistrial.
472	The Court overruled the defense objection to introduction of State's Exhibit No. 2, State's Exhibit No. 3, State's Exhibit No. 4, State's Exhibit No. 5.

SUMMARY OF RULINGS AND ACTIONS
ADVERSE TO APPELLANT

Record Page No.	Summary
485	The Court overruled the defense objection to the introduction of State's Exhibit No. 8.
496	The Court overruled the defense objection to introduction of State's Exhibit No. 12.
500	The Court overruled the defense objection to the introduction of State's Exhibit No. 11.
509	The Court overruled the defense objection to the introduction of State's Exhibit No. 9.
513	The Court overruled the defense objection to the introduction of State's Exhibit No. 10.
576	The Court overruled the defense objection to the showing of a picture to Michael Beckham, the defense objection being that the picture was tantamount to a leading question.
592	The Court overruled the defense objection to the use and introduction of State's Exhibit No. 22 and 23.
603	The Court overruled the defense objection to a line of questioning concerning a fingerprint found on tape.
611	The Court overruled the defense objection to the identification of a photograph of a fingerprint on the grounds that the proper chain of custody had not been shown.

SUMMARY OF RULINGS AND ACTIONS ADVERSE TO APPELLANT

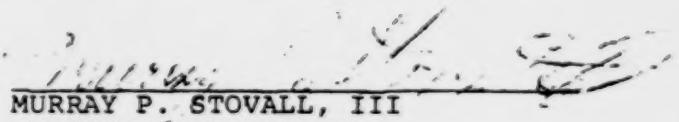
Record Page No.	Summary
613	The Court overruled the defense objection to testimony concerning a fingerprint found on the tape because of a lack of a proper chain of custody.
614	The Court overruled the defense objection to State's Exhibit No. 25 on the basis of the proper chain of custody not having been established.
627	The Court overruled the defense's renewal of a motion to suppress the statements made by the Defendant, said motion being based on Edwards v. Arizona.
635	The Court overruled the defense objection to the introduction of the statement of the Defendant.
688	The Court overruled the defense objection to the testimony concerning State's Exhibit No. 28 for identification.
690	The Court overruled the defense objection to the introduction of State's Exhibit No. 28.
692	The Court overruled the defense objection to the introduction of State's Exhibit No. 29.
693	The Court overruled the defense objection to the introduction of State's Exhibit No. 31.
694	The Court overruled the defense objection to the State's Exhibit No. 32.
701	The Court overruled the defense renewed objection to testimony concerning photograph of a spool of tape.

SUMMARY OF RULINGS AND ACTIONS ADVERSE TO APPELLANT

Record Page No.	Summary
790	The Court overruled the defense objection to the introduction of testimony about underpants and the underpants themselves of the Defendant as not having probity value and also that the pants had been substantially altered.
828	The Court overruled a renewed objection to the introduction of State's Exhibit No. 80, the underpants of the Defendant.
864	The Court overruled a defense renewed motion to suppress statements made by the Defendant based on Edwards v. Arizona.
920	The Court overruled the defense motion to suppress statements of the Defendant based on the failure of the State to show corpus delecti before the introduction of the statement. The Court also overruled the renewed defense motion to strike Michael Beckham's testimony based on a failure to make out a prima facie case under 13-A-5-31(3) of the Alabama Criminal Code. The Court also overruled a renewed motion by the defense to exclude and strike any evidence concerning the adhesive tape that had been admitted in the evidence, and any evidence arising out of the introduction of said adhesive tape, including but not limited to, the testimony and other evidence concerning fingerprints which were obtained from the tape.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the above and foregoing Brief of Appellant has been served upon the Honorable Charles Graddick, Attorney General for the State of Alabama, by mailing said copy to him, postage prepaid, by United States Mail, to his regular business address on this the 7th day of October, 1982.



MURRAY P. STOVALL, III
ATTORNEY FOR APPELLANT.

IN THE COURT OF CRIMINAL

APPEALS OF ALABAMA

SIXTH DIVISION 669

HORACE FRANKLIN DUNKINS, JR.,

APPELLANT,

VS.

STATE OF ALABAMA,

APPELLEE.

APPLICATION FOR REHEARING

Comes now, the applicant in the above styled cause, by and through his attorney, Murray P. Stovall, III, and requests this Honorable Court to grant to appellant a rehearing in the said cause and to set aside, amend and hold for naught the judgment rendered on February 1, 1983, affirming the judgment of the Circuit Court of Jefferson County, Alabama. Appellant submits both brief and argument in support of this application.

Respectfully submitted,

MURRAY P. STOVALL, III
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AGE HERALD BUILDING
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Birmingham, AL 35203
Phone: (205) 252-9751

IN THE COURT OF CRIMINAL APPEALS

OF ALABAMA

HORACE FRANKLIN DUNKINS, JR.,

APPELLANT,

VS.

STATE OF ALABAMA,

APPELLEE.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF CASES AND OTHER AUTHORITIES

STATEMENT OF THE CASE

The Appellant was indicted and convicted of the capital offense of rape when the victim is intentionally killed Alabama Code §13A-5-31 (a) (3) (1975). In a separate hearing, the jury fixed the Appellant's punishment at death. Upon appeal, the judgment of the Circuit Court was affirmed on February 1, 1983. Appellant now seeks the entry of judgment by this Honorable Court to allow a rehearing of this matter.

ISSUE PRESENTED AND ARGUMENT

Appellant contends that this Honorable Court erred in not reversing the Appellant's conviction on the grounds that the Court misapplied the substance and intent of Edwards v. Arizona, 451 U.S. 477 (1981). In Edwards, the Supreme Court of the United States very plainly states that when an accused has exercised his right to counsel all questioning must cease until counsel is present or until the accused initiates second conversation or interrogation with the police. In the case before this Court the Defendant did not, by any stretch of the imagination, initiate the second interrogation. On the contrary, he was re-arrested, taken away from his home, taken to unfamiliar surroundings, and confronted with incriminating statements made by a co-defendant for a period of some forty-eight (48) minutes before giving a statement to the authorities. On page four of this Court's Opinion, this Court emphasis the prohibition against investigative interrogation continuing after an attorney has been requested, by citing United States v. Grant, 549 F.2nd 942, 946 (4th Cir.), cert. denied, 432 U.S. 908 (1977).

This Court on page five of its Opinion distinguishes this case from Edwards v. Arizona,

> "because of the critical facts that the defendant was released from custody after he requested counsel and that he expressed a complete willingness to talk with Deputy House."

No where in Edwards does the Supreme Court of the United States set out that the authorities may not question a defendant further after he expresses desire for counsel, unless he is released from custody. As a matter of fact in the very case that this Court cites on page five of its Opinion Swint v. State, 409 So. 2d 992 (Ala. Crim. App. 1982), there was sworn testimony that the defendant in that case was not even in custody at the time that the incriminating statement was made. However, this very Court overturned the Swint case on the basis of Edwards v. Arizona, as a result of the defendant being questioned further after exercising his right to have counsel present.

Further, it is incomprehensible that an attempt by a nineteen (19) year old, semi-literate youth to cast the shroud of guilt from his shoulders by expressing a willingness to talk further could be construed as an initiation of further communication,

exchanges or conversations with the police. This Court cites also Warrick v. State, 409 So. 2d 984 (Ala. Crim. App. 1982) as being a guide line to the distinguishability of this case from Edwards. However, in Warrick this Honorable Court upheld the premise of Edwards v. Arizona, and reversed and remanded the case as a result of further questioning by the authorities after an exercise of the defendant's right to counsel.

CONCLUSION

Appellant contends that the issues raised in this Brief indicate that the rights of the Appellant as guaranteed by the Constitution of the United States and the Constitution of the State of Alabama were violated in the investigation and prosecution of this case in the lower Court. Appellant submits that these issues require and justify an order of reversal by this Honorable Court, and that the sentence handed down by the lower Court demands that all issues raised by Appellant or those noted by this Court in a thorough search of the record, be viewed in a light most favorable to the Appellant.

For all of the above, Appellant respectfully requests that the judgment of the lower Court be reversed and this cause be remanded for further adjudication consistent with the findings and orders of this Honorable Court.

Appellant submits that the Honorable Court of Criminal Appeals should allow a rehearing of this matter.

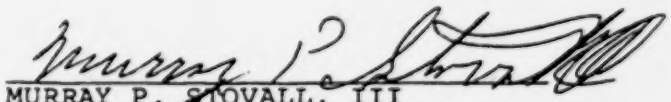
Respectfully submitted,

Murray P. Stovall

MURRAY P. STOVALL, III
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Application for Rehearing and Brief of Appellant has been served on the Honorable Charles Graddick, Attorney General for the State of Alabama, by mailing the same to him by the United States Mail, properly addressed, with First Class postage prepaid.



MURRAY P. STOVALL, III
ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief and Petition for Writ of Certiorari of Appellant has been served on the Honorable Charles Graddick, Attorney General for the State of Alabama, by mailing the same to him by United States Mail, properly addressed, with First Class postage prepaid on this the 14th day of March, 1983.

MURRAY P. STOVALL, III

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1982-83

6 Div. 669

Horace Franklin Dunkins, Jr.

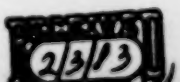
v

State

Appeal from Jefferson Circuit Court

BOWEN, JUDGE

The defendant was indicted for the capital offense of "rape when the victim is intentionally killed" in violation of Alabama Code Section 13A-5-31(a)(3) (1975). A jury found him guilty of "the capital offense as charged in the indictment."



A separate sentencing hearing was held and the jury fixed the defendant's punishment at death. The trial court then held a separate hearing as required by Alabama Code Sections 13A-5-32 and-33 (1975), adjudged the defendant guilty of the capital offense as charged in the indictment, and fixed his sentence at death. Three issues are argued on appeal.

I

The defendant contends that his Fifth Amendment rights were violated when he was subjected to police questioning after requesting counsel. He argues that Edwards v. Arizona, 451 U.S. 477 (1981), is controlling. Edwards followed the holding of Miranda v. Arizona, 384 U.S. 436 (1966), that if the accused requests counsel, "the interrogation must cease until an attorney is present." Miranda, 384 U.S. at 474.

> "(W)e now hold that when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchange or conversations with the police."
> Edwards, 451 U.S. at ____.

The crime was committed sometime during the night of Monday, May the 26th or the early morning of May the 27th. The defendant and Ernest Jackson were taken into custody by Deputy Sheriff James Earl Smith a little after 9:00 A.M. on the 27th and transported from Alabama Wire Company, where they were employed, to the Jefferson County Sheriff's Office. The defendant was fully advised of his constitutional rights under Miranda v. Arizona, supra, and made a voluntary, knowing and intelligent waiver.

Sergeant Smith then asked the defendant "some questions about some of his personal history and he said he didn't want to

talk to no one, wanted to talk to a lawyer." Smith asked, "In other words you don't want to talk to me any more, is that correct?" The defendant replied, "No" and Smith concluded the statement at 10:00 A.M. without asking any additional questions. The record indicates that defendant answered a few of Sergeant Smith's questions and then said, "Before I talk any more now I would like to talk to my lawyer, or either my mama or somebody, I'm run down at this place." After the defendant said this, Sergeant Smith asked him some "personal history questions" concerning his age, height, weight, name, address and phone number.

After the request for counsel, the defendant was not questioned about the murder. The interview began at 9:49 A.M. and ended at 10:00 A.M.

After the questioning stopped, the defendant was told that he was going to be placed in a lineup and that if he could not be identified he would be taken back to work. The defendant was not identified, was released from custody and was taken back to his place of work around noon.

On the way back to Alabama Wire Company, Jackson volunteered to take a polygraph test. The defendant also agreed to do the same. The next day, May 28th, Deputy Sheriff Fred House picked up the defendant and Jackson at the Alabama Wire Company and took them to the Sheriff's Office to take the polygraph. After the test, both the defendant and Jackson were taken back to the Wire Company. Deputy House testified that on the way back to the company, the defendant told him that "he would be willing to talk with me more if I wanted him to, and what time he would get off that evening and he would be home if I needed to talk to him more."

Deputies Smith and House talked with the defendant's parents around 4:00 that afternoon. During the conversation, the defendant arrived and remained present but was not questioned.

About two or three hours later that afternoon, Deputy House telephoned the defendant at home and told him he needed to talk to him. The defendant agreed to go to City Hall with Deputy House. There, the record shows, the defendant was repeatedly advised of his Miranda rights and made both an oral and a written waiver of his constitutional rights.

Roger Dale Beam, Chief of Police of Warrior, told the defendant that Frank Marie Harris had given a statement implicating the defendant, that Beam knew the defendant was involved and would prove it if it was the last thing he ever did. The Chief was in the same room with the defendant for no more than a minute and a half and made this statement as they "were passing".

Deputy House told the defendant that he was being arrested for rape and murder. After House informed the defendant of the evidence against him, including the statement given by Harris, the defendant confessed and admitted his participation in the crime. Before the defendant told his "side of the story", Deputy House asked him whom he wanted present during the interview and the defendant stated that he wanted House and Deputy Carl Johnson present. With these officers present, the defendant then admitted his involvement.

The substance and intent of Edwards were not violated. After the defendant requested counsel all questioning concerning the facts of the case ceased. The defendant's constitutional rights were not violated by the fact that Deputy Smith sought biographical information from the defendant after the defendant had requested counsel. Varner v. State, 418 So.2d 961, 962 (Ala.Crim.App. 1982). Miranda does not erect "an absolute per se bar on any conversation with the accused by investigating officers after the former has requested counsel. It only inhibits investigative interrogation related to the specific crime itself." United States v. Grant, 549 F.2d 942, 946 (4th Cir.), cert. denied, 432 U.S. 908 (1977).

After the defendant was not identified in a lineup, he was released from custody and remained free for more than twenty-four hours. Sometime during that time he indicated to the police that he would be willing to talk to them. This is just the opposite of the facts in Edwards where Edwards, after having requested to see counsel, was told that "he had" to talk to the police. This case is clearly distinguishable from Edwards because of the critical facts that the defendant was released from custody after he requested counsel and that he expressed a complete willingness to talk with Deputy House. Swint v. State, 409 So.2d 992 (Ala.Crim.App. 1982); Warrick v. State, 409 So.2d 984 (Ala.Crim.App. 1982).

In this case we have both express and explicit oral and written waivers of Miranda. North Carolina v. Butler, 441 U.S. 369, 375-76 (1979) (Although a Miranda waiver must be made specifically, it need not be express but may be inferred from the circumstances).

Confrontation with a co-defendant's confession is not necessarily an unfair tactic or unlawfully coercive. Gibson v. State, 347 So.2d 576, 582 (Ala.Crim.App. 1977). That the defendant's statement was motivated by his feeling of revenge against Harris and induced by his desire to see Harris prosecuted for the murder and rape does not render his statement involuntary. Moore v. State, 415 So.2d 1210, 1214 (Ala.Crim.App. 1981); Oliver v. State, 399 So.2d 941, 945 (Ala.Crim.App. 1981).

Clearly, a confession induced by a threat that the accused will be prosecuted unless he confesses will render any statement or confession involuntary and inadmissible in evidence. Hinshaw v. State, 398 So.2d 762 (Ala.Crim.App.), cert. denied, 398 So.2d 766 (Ala. 1981). We do not consider Chief Beam's statement that he would prove that the defendant "did it" as a threat in order to get the defendant to confess. We find no express or implied threat in Chief Beam's statement that the defendant would be prosecuted unless he confessed.

Threatening the defendant with prosecution if he does not confess is not the same as confronting an accused with evidence of his guilt. From the record, it appears that the law enforcement officers were totally candid in their dealings with the defendant. The statements made and the attending circumstances were not calculated to delude the defendant as to his true position, or exert improper and undue influence over his mind. There was no fraud, trickery, or subterfuge employed. 99 A.L.R.2d 772 (1965). The record supports no inference of pretense, artifice or deception. To the contrary, the record shows that the law enforcement officers were honest and straightforward in confronting the defendant with the case they had against him.

We have thoroughly reviewed the totality of the circumstances surrounding both statements given by the defendant, including the facts that he was nineteen years old and almost illiterate. Our assessment of these facts convinces us that both statements were completely voluntarily given after a knowing and intelligent waiver of constitutional rights.

II

We cannot accept the defendant's contention that the corpus delicti of the capital offense charged in the indictment was not proven because the State failed to prove rape or attempted rape.

It is true, as the defendant argues, that there was no physical evidence of rape presented. Because of the quantity of blood present, tests of the victim's body cavities did not reveal the presence of seminal fluid. However, the circumstantial evidence affords satisfactory proof of the corpus delicti. A small area on the front of the defendant's undershorts was stained with human blood.

Michael Beckham was with the defendant and Frank Harris on the afternoon of May 26th. He heard the defendant tell Harris, "I'm going to get some pussy from a white lady"

and Harris responded, "Yeah, I'm with you Horace." At the defendant's request, Beckham purchased the tape that was later used to bind the victim's wrists.

The victim was found tied to a tree with sixty-six stab wounds "over multiple body surfaces, including the chest, the abdomen, the upper legs, both back and front, and also in the personal region." The victim was naked except for a night-gown or negligee which was wrapped over her head.

In addition to a stab wound which penetrated the vaginal vault, there were lacerations of the vagina. Jay Glass, Chief Medical Investigator of the Office of the Coroner - Medical Examiner of Jefferson County, testified that lacerations mean "a tearing injury, tearing of tissue." There were also lacerations of the rectum.

What this Court said in Watters v. State, 369 So.2d 1262 (Ala.Crim.App. 1978), reversed on other grounds, 369 So.2d 1272 (Ala. 1979), another capital case, applies here. There the appellant argued that the only evidence of any attempted robbery in a prosecution for attempted robbery when the victim is intentionally killed was supplied by the confession, and that there was no independent, probative evidence to corroborate the confession. We held:

> "It is a settled principle of law that a mere extrajudicial confession, uncorroborated by other facts, is insufficient to show the corpus delicti and cannot support a conviction. Matthews v. State, 55 Ala. 187, 28 Am.Rep. 698 (1876); Reynolds v. State, Ala.Cr.App., 346 So.2d 979, cert. denied, Ala., 346 So.2d 986 (1977). However, it is equally as settled that inconclusive facts and circumstances tending prima facie to show the corpus delicti may be aided by the admissions or confession of the accused so as to satisfy the jury beyond a reasonable doubt, and so to support a conviction, although such facts and circumstances, standing alone, would not thus satisfy the jury of the existence of the corpus delicti. Hill v. State, 207 Ala. 444, 93 So. 460 (1922); Bryant v. State, 33 Ala.App. 346, 33 So.2d 402 (1948).
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> "Circumstantial evidence may afford satisfactory proof of the corpus delicti.

> The presentation of facts, from which the jury may reasonably infer that the crime charged was committed, requires the submission of such question to the jury. Johnson v. State, 247 Ala. 271, 24 So.2d 17 (1946); Taylor v. State, 276 Ala. 232, 160 So.2d 641 (1964). Reasonable inferences may furnish a basis for proof beyond a reasonable doubt. Royals v. State, 36 Ala.App. 11, 56 So.2d 363, cert. denied, 256 Ala. 390, 56 So.2d 368 (1952).
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> "The facts in this case and the legal inferences springing from them fully support and corroborate the appellant's confession. The evidence is therefore sufficient to support a conviction." Watters, 369 So.2d at 1271-72.

Under those principles set forth in Dolvin v. State, 391 So.2d 133 (Ala. 1979), and Cumbo v. State, 368 So.2d 871 (Ala.Crim.App. 1978), cert. denied, 368 So.2d 877 (Ala. 1979), there was evidence from which the jury might reasonably conclude that the evidence and all reasonable inferences therefrom excluded every reasonable hypothesis other than guilt and proof of the corpus delicti of rape.

The corpus delicti of a crime need not be shown by evidence "wholly independent of the relation of the accused to the offense charged. The evidence that defendant committed the crime may be so inextricably blended with proof of the corpus delicti as to make a separation impossible." DeSilvey v. State, 245 Ala. 163, 165, 16 So.2d 183 (1944).

Any error in the failure to prove the corpus delicti prior to the introduction of a confession is cured by subsequent proof of the corpus delicti. Phillips v. State, 248 Ala. 510, 517, 28 So.2d 542 (1946); Cooley v. State, 233 Ala. 407, 409, 171 So. 725 (1937).

III

Prospective juror Mencer was properly excluded for cause because she made it unmistakably clear that she would automatically vote against the death penalty regardless of the evidence. Ms. Mencer was questioned by the State, the defendant and the trial court. She repeatedly and consistently made it

clear that she would automatically vote against the death penalty in favor of life imprisonment without parole regardless of the evidence because "to die would be the easy way out."

> "I feel that anybody who commits a crime should be punished even if it's my son, and I only have the one. However, I do not feel that death is the answer. I feel that if I take a life, an eye for an eye is not the answer. I feel that I need to know the feeling. I need to feel it. And the only way I can feel it is to live, eventually live, with my conscience, live with the thought that I have committed this act or this crime. So that I feel to suffer behind bars is a much greater punishment than death. I look at death as being the same as being asleep. And when I'm asleep, I don't know anything about what I've done. I mean I'm at peace - - let me say it that way - - I'm at peace. But if I have to face day in and day out behind bars and I know that I'm not going to be paro'ed, or the other person, I feel that's worse than dying."
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> "Under no circumstances would I want them to get out that lightly (with life without parole). And that's what I'm saying. I feel that if they have committed a crime, then they should not die, because that is too easy."

Under questioning by the trial judge, Ms. Mencer indicated unequivocally and positively that even if convinced beyond a reasonable doubt and to a moral certainty of the defendant's guilt she could not fix punishment at death and she could not conceive in her own mind of any circumstance, even if convinced of the defendant's guilt, where she would fix punishment at death if that were one of the available or alternative punishments.

Witherspoon v. Illinois, 391 U.S. 510, 522-23 (1968), made it clear that a prospective juror may properly be excluded for cause where he "would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case." (Emphasis in original). See also Adams v. Texas, 448 U.S. 38 (1980); Annot., 39 A.L.R.3d 550 (1971). Witherspoon does not compel any inquiry into the

subjective reasons why a prospective juror is irrevocably committed to vote against the death penalty. Such an inquiry is, in fact, irrelevant to the very purpose of Witherspoon, which is to produce a fair and impartial jury.

> "The right under the Sixth and Fourteenth Amendments to trial by a jury guarantees to the criminally accused 'a fair trial by a panel of impartial, "indifferent" jurors.' Irvin v. Dowd, supra, 366 U.S. at 722, 81 S.Ct. at 1642. Accord, e.g., Murphy v. Florida, 421 U.S. 794, 799, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975). But the state also enjoys the right to an impartial jury, Williams v. Wainwright, supra, 427 F.2d at 923, and impartiality requires not only freedom from jury bias against the accused and for the prosecution, but freedom from jury bias for the accused and against the prosecution. Hayes v. Missouri, 120 U.S. 68, 70-71, 7 S.Ct. 350, 351, 30 L.Ed. 578 (1887). See Comment, 21 Vand.L. Rev. 864, 865 (1968)."
> Spinkellink v. Wainwright, 578 F.2d 582, 596 (5th Cir. 1978).

"Coexisting with the petitioner's right to an impartial jury, after all, is the State's right to have a jury that is willing to consider all the penalties prescribed by law."

Williams v. Maggio, 679 F.2d 381, 385 (1982).

> "All veniremen are potentially biased. The process of voir dire is designed to cull from the venire persons who demonstrate that they cannot be fair to either side of the case. Clearly, the extremes must be eliminated - i.e., those who, in spite of the evidence, would automatically vote to convict or impose the death penalty or automatically vote to acquit or impose a life sentence. The guarantee of impartiality cannot mean that the state has a right to present its case to the jury most likely to return a verdict of guilt, nor can it mean that the accused has a right to present his case to the jury most likely to acquit. But the converse is also true. The guarantee cannot mean that the state must present its case to the jury least likely to convict or impose the death penalty, nor that the defense must present its case to the jury least likely to find him innocent or vote for life imprisonment."
> Smith v. Balkcom, 660 F.2d 573, 578-79 (5th Cir. 1981) (emphasis in original), modified on unrelated point, 671 F.2d 858 (1982).

Here, Ms. Mencer indicated that she was unwilling to consider all of the penalties provided by state law, and that she was irrevocably committed, before the trial began, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings and ever if convinced of the defendant's guilt of the crime charged beyond any reasonable doubt and to a moral certainty. Therefore, she was properly excused for cause. This is exactly what Witherspoon requires. 391 U.S. at 522, n. 21.

IV

As required, Beck v. State, 396 So.2d 645, 664 (Ala. 1981), this Court has examined this particular death sentence in light of the standards and procedure approved in Gregg v. Georgia, 428 U.S. 153 (1976). The defendant was indicted and convicted for a crime that is, in fact, properly punishable by death. We take judicial knowledge that similar crimes throughout the state are being punished capitally. The defendant's accomplice, Frank Marie Harris, pled guilty and received life imprisonment.

The trial judge specifically found, and we agree, that the death sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. The evidence overwhelmingly supports the finding of the statutory aggravating circumstance that the capital offense was especially heinous, atrocious, or cruel. Kyzer v. State, 399 So.2d 330, 333-34 (Ala. 1981); Alabama Code Section 13A-5-35(8) (1975). The trial judge specifically found (and all the evidence supports that finding) that the victim "was alive at the time she was stabbed sixty-six times." The aggravating circumstances (Sections 13A-5-35(4) and (8)) far outweigh the mitigating circumstances (the defendant's age (19))and the fact that he had no significant history of prior criminal activity[1].

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1. The defendant had been previously charged with rape in an unrelated case, but was acquitted. The trial judge, properly, did not consider that charge to negate the Section 13A-5-31(1) mitigating circumstance. See Cook v. State, 369 So.2d 1251, 1257 (Ala. 1979).

Because the aggravating circumstances remarkably and exceedingly outweigh the mitigating circumstances, this Court concurs in and affirms the findings of the jury and the trial court that death is the appropriate sentence. Indeed, applying the laws of this state and nation to the particular facts of this case, we do not see how any other penalty is justified. The judgment of the circuit court is affirmed.

AFFIRMED.

All Judges Concur.